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No. 95-365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government concedes that it violated the Rehabilitation Act ("the Act") when it excluded Griff Lane from the Merchant Marine Academy. Brief for the Respondents ("Govt Br.") 5 n.1. It also concedes that this violation caused Lane $75,000 in damages, including lost future earnings and out-of-pocket expenses. Pet. App. 9a. It furthermore concedes that Congress has waived the federal government's sovereign immunity so that Lane could bring suit challenging the government's violation, and it has not disputed Lane's contention that the scope of that waiver is entitled to a "liberal construction" in order to accomplish the "beneficent purposes" of the Act. *See* Brief for Petitioner ("Lane Br.") 37-38 (citing *United States* v. *Williams*, 115 S. Ct. 1611, 1623-24 (Rehnquist, C.J., dissenting)).

But the government contends that Congress did not intend Griff Lane to be made whole for its conceded violation. Instead, according to the government, even though Congress intended the substantive nondiscrimination provision of Section 504 to apply equally to *all* governmental and private entities, Congress contemplated that the remedies would differ depending on which entity violated that provision.

Specifically, the government's theory is that if a private party receiving federal financial assistance violates the Act, Congress intended that all appropriate relief should be granted to make the victim whole, including declaratory and injunctive relief, back pay, attorneys' fees, and money damages. The government says the same is true if the violator is a State or local government. And it says the same is still true if the Federal government violates the Act with regard to employment. It even appears to concede that Congress intended that federal agencies be suable under Section 504 and that money damages would be available in those suits, but *only* when the agencies are merely funding another entity that discriminates, not when the agencies directly discriminate themselves. Indeed, when agencies directly discriminate in violation of the Rehabilitation Act, and if the violation is not against a federal employee, then the government argues that Congress intended all remedies except money damages to be available, even if denial of those damages would effectively deprive the victim of any remedy at all.

In its brief, the government does not even attempt to offer a plausible reason why Congress would intend such a crazy-quilt result. Neither does it suggest any basis for supposing that sovereign immunity concerns would have caused Congress to legislate such a result, *i.e.*, to authorize suit against the Federal government, to authorize the intrusiveness of injunctive relief against the government (relief which the government did not appeal in this case), to authorize monetary relief in the

form of back pay and attorneys' fees, and to authorize money damages against itself in the case of employment-related disability discrimination, or in the case of its funding of non-federal entities that discriminate, but then to deny money damages to people like Griff Lane.

Instead of pointing to anything in the history, purposes, or policy of the statute indicating that Congress intended such a result, the government considers each of the four key statutory provisions in a vacuum (the original 1973 Section 504, the 1978 Amendments, the 1986 Amendments, and the 1992 Amendments), offers a strained interpretation of each, ignores the implications of its interpretation, ignores how the four enactments fit together, and ignores what those enactments were intended to do. As a result, as we will show, the government's approach is not the "common sense inquiry" this Court requires, and it produces an implausible interpretation of the statute that the Court should not accept. *See United States* v. *Williams*, 115 S. Ct. at 1618.

1. At the outset, the government contends that the requisite waiver of sovereign immunity in this case cannot be based on "the general purposes of [the] statute" or on "policy considerations underlying the statute." Instead, it must be based on "affirmative statutory authority." Govt Br. 10-11. In fact, our case *is* squarely based on "affirmative statutory authority." And this Court has made clear that purpose and policy are important indicia of the meaning of that authority. *See* Lane Br. 11-12.

2. The government next implies that our statutory-authority argument is merely "that Congress nowhere expressed any intention to treat Federal agencies differently from non-federal defendants, against whom monetary damages can be recovered under Section 504(a)." Govt Br. 15. In fact, our argument is that Congress *repeatedly* and *affirmatively* expressed its intention: (1) that federal agencies should be subject to

the same duties and the same remedies as non-federal defendants; and (2) that those same remedies should include damages.

a. Thus, in the 1978 Amendments Congress expressly added federal agencies as defendants subject to Section 504's nondiscrimination requirement, and did so at a time when it was quite clear that the non-federal defendants already covered by that requirement were subject to a private right of action for damages. *See* Lane Br. 15-16. It is undisputed from the legislative history that Congress' purpose in adding federal agencies to the statute was to equalize their responsibility with that of non-federal defendants. *See* Lane Br. 19-20.

b. Similarly, in the 1986 Amendments, in reaction to this Court's decision in *Atascadero*,[1] Congress expressly added States as defendants subject to the Act. And in doing so, it provided that States would be subject to the same remedies under Section 504 -- "both at law and in equity" -- as those available against "any public or private entity." This Amendment not only made clear that all Section 504 defendants, both "public" and "private," were to be treated alike for purposes of remedies, but also, as this Court confirmed in *Franklin*,[2] the Amendment made clear that those remedies included damages. And significantly, as *Franklin* also demonstrates, inasmuch as the 1986 Amendments were sufficiently clear to abrogate the States' sovereign immunity from damages, 503 U.S. at 72-73, they were necessarily equally sufficient to confirm the waiver of immunity from damages for all other "public entities" subject to the Act, including the Federal government.

3. The government's answer to these clear expressions of Congress' intent is to offer the kind of "strained," "technical," "formalis[tic]" reading of the

[1] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985).

[2] *Franklin* v. *Gwinett County Pub. Schs.*, 503 U.S. 60 (1992).

statute the Court found inappropriate in *Williams*, 115 S. Ct. at 1618.

a. Thus, with regard to the 1978 Amendments, the government says first that "by [their] terms" those Amendments "did not * * * waive the federal government's sovereign immunity against awards of money damages for violations of its statutory obligation not to discriminate on the basis of handicap." Govt Br. 14. It is true that they did not do so "by [their] terms." But neither did the 1986 Amendments do so with regard to abrogating the States' immunity from damages for violations of its statutory obligation. *See* pp. 16-17, *infra*. The test, however, is whether Congress' intent is clear, not whether it has used a particular phrase or term. *See* Lane Br. 11-12.

b. The government says that Congress' intent is not clear because another provision of the 1978 Amendments -- Section 505(a)(2) -- states that Title VI remedies will be available for violations of the Act[3] "by any recipient of Federal assistance or Federal provider of such assistance," and that Congress thereby intended that those remedies would *not* be available against a Federal agency when it violates Section 504. In other words, the government argues that because Section 504 prohibits discrimination by federal recipients and "Executive agenc[ies]," while Section 505(a)(2) provides remedies against federal recipients and "Federal provider[s]," Congress intended a disconnect between the two sections, *i.e.*, that it deliberately provided that there should be *no remedies* for discrimination by executive agencies. There are at least three reasons why this construction of the statute is implausible.

First, as the Ninth Circuit explained in *Doe*,[4] the apparent "incongruity" between the two sections is ex-

[3] The government does not dispute that Title VI remedies include money damages. *See* Lane Br. 15-16.

[4] *Doe* v. *Attorney General*, 941 F.2d 780 (9th Cir. 1991).

plained by the fact that the amendment to Section 504 adding the government as a defendant originated in the House; the amendments to Section 505 defining remedies originated in the Senate; and the Conference Report did not adapt the former's language to exactly coincide with the latter's. 941 F.2d at 780 n.13. *See* H.R. Conf. Rep. No. 1780, 95th Cong., 2d Sess. 92-93 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7375, 7403-04. But this happenstance cannot reasonably be read to mean that the same Congress that both amended Section 504 to prohibit federal-agency discrimination, and in Section 505 provided remedies for violations of Section 504, intended *no remedies* for the newly-enacted application of Section 504 to federal agencies.[5] Indeed, if the use of "Federal provider" in Section 505(a)(2) were read to mean that no remedy was intended against executive agencies, then Section 505(b), enacted at the same time as the other 1978 Amendments, would make no sense. Section 505(b) authorizes attorneys' fees "[i]n *any* action" that "charge[s] a violation" of Section 504 (emphasis supplied). Section 504 undeniably applies to executive agencies. However, by the government's reading of Section 505(a)(2), Congress intentionally provided no action to "charge a violation" of Section 504 by any executive agency. This is implausible.

Second, if the government were correct that "Federal provider" should be read not to include or be interchangeable with "Executive agency," it is not clear what violation is to be charged against those "providers" for purposes of Section 505(b). The government suggests in its brief that "the remedial provision of Section 505(a)(2)" extends "only to the funding activities of federal agencies," but it does not explain what that means. Govt Br. 15-16. Nor does it explain what duties Section 504 places on those "providers" with regard to their "funding activities," other than their duty not to discriminate.

[5] Such a construction of Section 505 would be particularly anomalous given that the entire purpose of the 1978 Amendments was to "extend and strengthen" the Act. H.R. Rep. No. 1149, 95th Cong., 2d Sess. 1, 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7312, 7313; *see Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 635 (1984) (Section 505(a)(2) "designed to enhance the ability of handicapped individuals to assure compliance with" Section 504) (quoting S. Rep. No. 890, 95th Cong., 2d Sess. 18 (1978)).

Presumably, the government means that Section 505(a)(2) should be read to create a cause of action against "Federal provider[s]" by persons whose real complaint concerns discrimination by "non-federal entities" that receive funds from those agencies. *See* Govt Br. 16 n.8. And presumably the government concedes that damages would be available against Federal providers in such a cause of action, inasmuch as they do not contest that damages are available under the Title VI remedies adopted by Section 505(a)(2). Yet the government never explains the circumstances in which it thinks such a cause of action is available to challenge an agency's "funding activities."

It surely does not mean that Congress intended an action to be available against the funding agency anytime it funds a non-federal recipient that has violated Section 504. Recognizing such a cause of action would not only be at odds with this Court's decision in *Cannon*[6] and the D.C. Circuit's decision in *Women's Equity Action League* v. *Cavazos*,[7] it would also be contrary to the decision of every Court of Appeals to have decided the issue since *Cannon*, whether considering the issue only under Title VI, or under Section 504.[8] Alterna-

[6] *Cannon* v. *University of Chicago*, 441 U.S. 677, 706 n.41, 710-11 n.46, 715 n.51 (1979).

[7] 906 F.2d 742, 747-50 (D.C. Cir. 1990).

[8] *See Washington Legal Foundation* v. *Alexander*, 984 F.2d 483 (D.C. Cir. 1993) (Title VI); *Marlow* v. *United States Dep't of Educ.*, 820 F.2d 581 (2nd Cir. 1987) (Section 504), *cert. denied*, 484 U.S. 1044 (1988); *Salvador* v. *Bennett*, 800 F.2d 97 (7th Cir. 1986) (Section 504); *NAACP* v. *Medical Center, Inc.* 599 F.2d 1247, 1254 n.27 (3d Cir. 1979) (Title VI and Section 504).

tively, the government may mean that federal agencies are suable only where their "funding activities" are such that they have effectively become discriminators themselves. If so, this would produce a particularly perverse reading of Sections 504 and 505: it would mean that although Congress expressly amended Section 504 to prohibit discrimination by the federal government, at the same time it expressly declined to create any remedy against the government for that discrimination, but nevertheless intended a new remedy against the federal government -- including money damages -- to challenge its *funding* of other entities that have discriminated, provided the government is implicated in that other entity's discrimination. The Court should not adopt such an implausible reading of Congress' intent. Nothing in the statute or its history anywhere suggests that Congress favored such an indirect, incomplete way to achieve the clear purpose of the 1978 Amendments to Section 504: stopping discrimination against the disabled by federal authorities.[9]

Finally, and in any event, even if the government were correct that the term "Federal provider" in Section 505(a)(2) must be read strictly in isolation, Griff Lane is entitled to damages against the Department of

[9] As Judge (now Justice) Ginsburg wrote in *Women's Equity Action League*, Congress contemplated two circumstances in which a federal agency might be sued for a violation of Section 504 and be subject to Title VI remedies for that violation: "[a] federal agency might itself be charged with discrimination, *see Traynor* v. *Turnage*, 485 U.S. 535 (1988), or as provider of financial assistance, with facilitating or encouraging a specific fund recipient's discrimination. *See, e.g.*, *Gautreaux* v. *Romney* [448 F.2d 731 (7th Cir. 1971)]." 906 F.2d at 750. In *Gautreaux*, because of "HUD's knowing acquiescence in [a federal recipient's] admitted discriminatory housing program," the court concluded that "the Secretary's * * * actions constituted racially discriminatory conduct in their own right." 448 F.2d at 737, 739 (footnote omitted). Thus, in both situations contemplated by Justice Ginsburg, the agency has discriminated in violation of Section 504 and is subject to Title VI remedies for that violation.

Transportation under that reading. DOT is unquestionably a "Federal provider"; [10] it unquestionably has violated Section 504; and since Section 505(a)(2) nowhere limits its remedies to the "funding activities" of providers, as suggested by the government, but says simply and only that "[t]he remedies * * * in title VI * * * shall be available to any person aggrieved by *any act* * * * [by a] Federal provider * * * under section [504]" (emphasis supplied), DOT's discriminatory "act" in this case is covered by the plain language of the statute. [11] Accordingly, Title VI remedies are available to compensate for that act. [12]

c. Even if the 1978 Amendments were not sufficiently clear by themselves to establish Congress' intent to make all remedies (including damages) available against all entities violating Section 504, the Rehabilitation Act Amendments of 1986 (Section 1003(a)(1) and (a)(2), 42 U.S.C. § 2000d-7(a)(1) and (a)(2)) served that purpose. In those Amendments Congress affirmed that "private" and "public" entities (including States) that

[10] *See* 49 C.F.R. § 27.3 (regulations concerning nondiscrimination on basis of handicap "appl[y] to each recipient of Federal financial assistance from the Department of Transportation and to each program or activity that receives or benefits from such assistance"); 49 C.F.R. § 27.5 (defining "Federal financial assistance" as, *inter alia* "any * * * other arrangement by which the Department provides or otherwise makes available assistance in the form of: Funds * * *"); *see also* 49 C.F.R. § 21 Appendix A (listing programs through which DOT provides assistance for purposes of Title VI).

[11] Congress obviously could have limited the liability of Federal providers to their "funding activities," as the government urges, but it did not do so. Instead, it made those providers liable for "any act" in violation of Section 504. Accordingly, the Court "must presume" that Congress "mean[t] * * * what it sa[id]" and intended this broader liability. *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004 (1994) (citation omitted).

[12] As noted, the government does not dispute that Title VI remedies include money damages.

violate Section 504 are subject to the same remedies -- "including remedies both at law and in equity." And in *Franklin* this Court made clear that those remedies include damages. In response, the government offers two arguments concerning these Amendments that ignore both Congress' purpose in enacting them and what Congress actually said in them.

First, the government contends that the 1986 Amendments merely "illustrate that Congress knew how to waive" an entity's immunity for damages "when it wished to do so," and that while it did so for States in the 1986 Amendments, it "did not do so with regard to damages under Section 504(a)." Govt Br. 20. But the purpose of the 1986 Amendments was to respond to this Court's decision in *Atascadero*. And contrary to the government's characterization of that decision, it did *not* hold "that Congress had not waived the sovereign immunity of the States against actions in federal court *for money damages* under Section 504." Govt Br. 20 (emphasis supplied). What it actually held was that the federal courts had no jurisdiction at all over an action under Section 504 against States, because States were not named *at all* in Section 504. 473 U.S. at 245-46.

Accordingly, in the first part of the 1986 Amendments (Section 1003(a)(1)), Congress made clear that States are subject to Section 504 (among other statutes) and expressly provided that they would not be immune from suit for violations of that Section. Obviously, no comparable provision was needed addressing the Federal government's immunity because, unlike States, "Executive agenc[ies]" had already been expressly covered by Section 504 since 1978.

Then, in the second part of the 1986 Amendments (Section 1003(a)(2)) Congress made clear the remedies for suits against States under Section 504. The government says that this part "met the unequivocal-statement standard for waiving the States' sovereign immunity against suit for specific remedies," yet as to the Federal

government's immunity from those remedies did nothing more than "drop coy hints." Govt Br. 22. [13] Again, the 1986 Amendments were addressed primarily to the States, not the Federal government. And in any case, the pertinent statutory language of the second part of the 1986 Amendments actually provides: "In a suit against a State for a violation of [Section 504], remedies (including remedies both at law and in equity) are available * * * to the same extent as such remedies are available in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2).

Thus, the unequivocal waiver of damages as to States which the government concedes is presented by this language was *dependent* upon the fact that such damages were *already available* against "any public or private entity" covered by Section 504 -- which included the Federal government. This is not a "coy hint" concerning the Federal government's liability. It is a clear statement that the States' liability should be *the same* as the Federal government's. Indeed, the name given to these Amendments (as shown in the Appendix to the government's own brief) was "Civil rights *remedies equalization.*" Govt Br. 3a (emphasis supplied).

In an effort to explain all this away, the government offers its most tortured statutory reading. The government contends that the equalization effectuated by the 1986 Amendments "applies only to remedies available for violation of statutes referred to in Section 1003(a)(1), *i.e.*, statutes that prohibit discrimination by recipients of federal financial assistance, including Section 504, Title VI, Title IX, and the Age Discrimination Act of 1975." Govt Br. 21-22. According to the government, "[i]t is thus likely that the 'public entities' to which Congress referred in Section 1003(a)(2) are not federal entities, but are the non-federal public entities receiving

[13] Quoting *Dellmuth* v. *Muth*, 491 U.S. 223, 230-31 (1989).

federal financial assistance that are covered by all of these statutes * * *." Govt Br. 22.

Again, the government is ignoring what the statute actually says. It is true that all of the statutes named in Section 1003(a)(1) cover non-federal public entities receiving federal financial assistance. But it is not true that these are the *only* "public entities" covered by this provision. Section 504 is specifically included in the provision and it is indisputable that the Federal government is a "public entity" covered by that Section. Furthermore, despite its use of the term "recipients of Federal financial assistance" in Section 1003(a)(1), Congress did not use that term in Section 1003(a)(2). Instead, rather than equalize remedies against States only with those available against recipients of federal financial assistance, it broadened that equalization to remedies available against "any public or private entity." Accordingly, it is not only not "likely," but it is implausible to suppose that the "public entities" whose liability was equalized with that of the States in the 1986 Amendments is limited only to recipients of federal financial assistance and did not include the Federal government.

4. Having no good answer to these clear indications in the 1978 and 1986 Amendments that damages are available for the Federal government's violation of Section 504, the government resorts to a related statutory provision to try to undermine this availability -- Section 501 of the Rehabilitation Act. As it does with the 1986 Amendments, the government argues that Congress showed with regard to Section 501 that it knows how to waive sovereign immunity for damages "in the required unmistakable language," and because similar language was not used with regard to Section 504, a similar waiver was not intended. Govt Br. 25. But the government overlooks the completely different context and history affecting Section 501 that explains why Congress used different language in its treatment of Sections 501 and 504.

Section 501 by its terms requires only that federal agencies adopt affirmative action plans for the hiring of disabled individuals. 29 U.S.C. § 791(b) (provided in full at Govt Br. 1a). Furthermore, as originally enacted in 1973, Section 501, unlike Section 504, did *not* confer a private right of action for those alleging a violation of its provisions. *See McGuinness* v. *United States Postal Serv.*, 744 F.2d 1318, 1319 (7th Cir. 1984).[14] As a result, in order to provide such a cause of action, Congress enacted Section 505(a)(1), and did so at the same time that it extended Section 504 to the federal government and provided (through Section 505(a)(2)) that Title VI remedies would be available for violation of that Section.

Thus, in the 1978 Amendments Congress for the first time provided a cause of action against the federal government for discrimination on the basis of disability, both in employment (Section 501) and otherwise (Section 504). It provided (in Section 505(a)(1)) that Title VII employment discrimination remedies would be available for violations of Section 501, and provided (in Section 505(a)(2)) that the normal Title VI remedies would be available for discrimination under Section 504. This differentiation in remedies was logical because Title VII, like Section 501, concerns discrimination in employment, and Title VI, like Section 504, broadly concerns discrimination in "programs and activities."

When Section 505 was enacted in 1978, Title VII provided only for the equitable remedies of reinstatement and back pay. In contrast, as noted, Title VI provided for money damages as well. As a result, in 1991 Congress amended Title VII (and Section 501) through the Civil Rights Act of 1991, Pub. L. No. 102-

[14] Federal courts interpreting Section 501 before 1978 uniformly held that it conferred no private right of action. *Coleman* v. *Darden*, 595 F.2d 533, 538-39 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979); *Ryan* v. *FDIC*, 565 F.2d 762, 763 (D.C. Cir. 1977); *McNutt* v. *Hills*, 426 F. Supp. 990, 997-98 (D.D.C. 1977).

166, § 102, 105 Stat. 1072, and for the first time made damages available for discrimination in employment under both Title VII and Section 501. *See Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1490 (1994) ("Before the enactment of the 1991 Act, Title VII afforded only 'equitable' remedies. The primary form of monetary relief available was backpay.").

In spite of this history, the government argues that because Congress failed to amend the remedies available under Section 504 as it twice did for Section 501, no compensatory damages are available against the United States pursuant to Section 504. The answer, of course, is that it was *completely unnecessary* for Congress to amend Section 504 because Title VI had long been interpreted to provide compensatory damages for its violation. *See Franklin*, 503 U.S. at 70 (noting that in 1983 "a clear majority" of this Court confirmed in *Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983), that damages are available under Title VI for intentional violations of that statute). Moreover, when Congress re-enacted Section 504 in 1992 after *Franklin* and did so without amendment, it must be assumed to have acted with knowledge of that decision, and its determination not to amend Section 504 thus reaffirms its intention to make damages available under that Section. [15]

[15] In our opening brief we contended that Congress' 1992 reenactment of Sections 504 and 505 without change signaled its knowledge and adoption of this Court's decisions in *Cannon* and *Franklin* establishing: that a cause of action existed under Section 504; that it included damages; and that the *Franklin* presumption of all remedies being available applied to federal agencies. Lane Br. 23. The government disputes none of this.

Instead, on two grounds it challenges our reliance on Senator Jeffords' endorsement of the Ninth Circuit's *Doe* decision in the 1992 Amendments' legislative history. *See* Lane Br. 23-24. First, it says that Senator Jeffords failed to identify "the requisite unequivocal statutory waiver of immunity against money damages." Govt Br. 23. But he did: he said it was already provided in the

In summary, then, when all of Congress' intentions regarding Sections 501 and 504 are considered, it is clear that Congress was determined to treat all federal disability discrimination alike -- both in employment and other areas -- and to make the same remedies (including damages) available for both.

5. The government devotes several pages of its brief to arguing that this Court's *Franklin* decision did not "abolish" the requirement that Congress' intent to permit damages must be clear and unequivocal. Govt Br. 25-31. But we have not argued that it did; and we certainly have not argued, as the government suggests, that *Franklin* overruled *Nordic Village*. Govt Br. 28. To the contrary, we expressly acknowledged in our brief, citing *Nordic Village*, that there is a "presumption" in this case "that Congress did not intend to permit the [requested] award of * * * damages unless it unequivocally expressed its intention to do so." Lane Br. 11 (citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)).

At the same time, we think the government is wrong to suppose that *Franklin* has no application to a case involving sovereign immunity. That cannot possibly be so, inasmuch as most of the cases relied on in *Franklin* involved cases against the Federal government. [16]

1978 Amendments, which he wrote. 138 Cong. Rec. S16,609 (daily ed. Oct. 5, 1992). To this the government says his view of those prior Amendments is of little weight. Govt Br. 23. That is not so. Although the Court has recognized that post-enactment legislative statements may not be entitled to the same deference as contemporaneous history, it still would be " 'remiss if [it] ignored [such] authoritative expressions' " of an Act's scope and purpose, particularly when it comes from the *author* of the Act. *See North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982) (quoting *Cannon*, 441 U.S. at 687 n.7); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

[16] The government attempts to factually distinguish the cases relied on by the Court in *Franklin* (Govt Br. 30), but this attempt misses the point of the cases. The point is that the Court relied on

Indeed, the clearest indication that the *Franklin* presumption applies in sovereign immunity situations is demonstrated by the *Franklin* Court's own application of that presumption to States sued under Section 504. As the Court held, in providing through the 1986 Amendments that "remedies both at law and in equity" shall be available in suits against States to the same extent that they are available against "public or private entit[ies]," Congress said "nothing about the nature of those other available remedies." 503 U.S. at 72-73. Nevertheless, the Court held that "we presume Congress enacted this statute with the prevailing traditional [all-remedies] rule in mind." *Id.* at 73. And the Court so held even though

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cases against the Federal government to illustrate the long-settled application of the presumption that once a cause of action is created (including against the government), it includes all appropriate remedial relief, unless Congress clearly expresses a contrary intention. There is simply no basis, therefore, in this Court's sovereign immunity jurisprudence or elsewhere, to conclude that the *Franklin* presumption is categorically inapplicable in the sovereign immunity context.

Furthermore, the government's attempts to distinguish the cited cases are unavailing. Thus, contrary to the government's assertion, in *Bell* v. *Hood*, 327 U.S. 678 (1946), the Court did not distinguish between damages and injunctive relief, because the plaintiffs sought only money damages. *Id.* at 679. And in fact, the Court in *Bell* v. *Hood* held that the district court had jurisdiction to entertain the claims for money damages raised by plaintiffs against the agents of the federal government. *Id.* at 684-85. Similarly, while in *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 611 (1838), the Court stated that a waiver of sovereign immunity must be provided by an act of Congress, it nonetheless found, in a case against the United States, that the all-remedies presumption (recognized in *Franklin*) was fully applicable. *Id.* at 624. The government's attempt to distinguish *Dooley* v. *United States*, 182 U.S. 222 (1901), is similarly without merit. There, in another case against the United States, the Court did state that "a liability created by statute without a remedy may be enforced by common-law action," *id.* at 229. But this hardly denies that the *Franklin* all-remedies presumption is applicable against the federal government; rather, it defines the circumstances in which the presumption is triggered.

the abrogation of a State's immunity from damages requires the same "unequivocal expression" that is required for waiver of the Federal government's sovereign immunity. *Nordic Village*, 503 U.S. at 37; *Dellmuth* v. *Muth*, 491 U.S. at 228-29.

Accordingly, contrary to the government's view, the Court does take account of the *Franklin* all-remedies presumption in sovereign immunity cases at least where, as here, it is quite clear that sovereign immunity has been waived and the only issue is the nature of the remedies being made available.[17] Moreover, we think the government is wrong to suggest (Govt Br. 31) that the sovereign immunity presumption and the all-remedies presumption are irreconcilably in conflict and the Court must invariably choose one or the other.[18] Rather, as *Franklin* demonstrates, both presumptions are merely guides to determining Congress' intent. And here, as in *Franklin*, the Court should conclude that while a clear waiver of immunity is required to permit

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[17] As the Court has often held, where, as here, Congress has unquestionably waived sovereign immunity and the issue concerns the terms and scope of the waiver, "the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.' " *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (quoting *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979)).

[18] In particular, the government is wrong to say that the "Court has uniformly ruled" that other "well-established" rules "must yield" when in "apparent conflict" with "the principle of sovereign immunity." Govt Br. 31. First, if there were a "conflict" here, *Franklin* itself demonstrates that the all-remedies presumption applies even in sovereign immunity situations. And second, the only case the government cites for its "uniform rule" is *Block* v. *North Dakota*, 461 U.S. 273 (1983). Govt Br. 31. But there, far from holding that one presumption (federal sovereign immunity) trumped another (the States' immunity from statutes of limitation), the Court harmonized them by examining the statute and its legislative history to determine whether, in waiving the Federal government's sovereign immunity for a particular suit, Congress had intended to make an exception for States who did not file within the statute of limitations.

recovery of damages, the language of the Rehabilitation Act effectuates that clear waiver and, moreover, the waiver is confirmed by the all-remedies presumption (a presumption Congress knew to be applicable to federal agencies and to Section 504 when it re-enacted that Section in 1992).

6. In its final effort to resist Congress' clear intention to provide a damages remedy in this case, the government implies in a footnote -- but does not affirmatively argue -- that Lane may not have a cause of action *at all* under Section 504, but only under the Administrative Procedure Act ("APA"). Govt Br. 27 n.17. It makes this suggestion because, as it notes, "[t]he waiver of federal sovereign immunity in the APA is limited to an action 'seeking relief other than money damages.' " *Id.* at 27-28 n.17 (citing 5 U.S.C. § 702). We do not think this suggestion is properly before the Court and in any case it is without merit.

a. The district court in this action expressly held that it was authorized to grant declaratory and injunctive relief against the government under Section 504. Pet. App. 57a. Based on this holding, it ordered the government to reinstate Lane at the Academy forthwith. *Id.* 63a. It furthermore originally held, until the D.C. Circuit's *Dorsey* decision required it to reverse itself, that damages were authorized against the government under Section 504. *Id.* 58a-60a. Although Lane appealed the district court's judgment with regard to damages, the government did not appeal the judgment granting declaratory and injunctive relief under Section 504. In these circumstances, we do not see how the government can now challenge that unappealed judgment and argue before this Court that there is no cause of action under Section 504. [19]

[19] *See United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1605 n.5 (1994); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, the government's belated APA claim is incorrect. As support for its claim, the government cites Judge (now Justice) Breyer's opinion for the First Circuit in *Cousins* v. *Secretary of United States Dep't of Transportation*, 880 F.2d 603, 605 (1989) (en banc). But as the Ninth Circuit explained in *Doe*, the circumstances in *Cousins* are very different from those presented here. *See* 941 F.2d at 793-94.

Cousins was a deaf man prevented by a DOT regulation from obtaining a license to work as a truck driver. Cousins therefore brought an action in district court under Section 504 alleging that the DOT regulation was discriminatory. The First Circuit held that "even though § 504's substantive standard applies, more broadly, to 'any program or activity conducted by any Executive agency' (presumably including regulatory programs), the Act is silent about whether and how a person injured by the government *as regulator* is to enforce the Act against the government." 880 F.2d at 605 (emphasis in original). And where a person challenges the government's action as a "regulator," the court held, there is "normally no *need* for an 'implied private right of action' " because APA review can afford such a person "adequate relief." *Id.* at 606 (emphasis in original). Indeed, the court said "it is difficult to imagine a case where an implied private right of action under some other statute [besides the APA] would be of much use to a plaintiff who wants to challenge agency action." *Id.*

For two reasons, *Cousins* has no application here. First, Lane does not challenge the actions of DOT and the other defendants as "regulators." Rather, he challenges their unlawful adjudications on the particular facts in his individual case. [20] Second, in any event his

[20] The district court's ruling in this case makes the individualized nature of Griff Lane's claim unmistakable:

> [T]he Court finds that the Defendants violated Section 504 of the Rehabilitation Act in separating Lane from the Academy, as they have failed to show that meeting the

case is plainly not the type envisioned in *Cousins*, *i.e.*, one in which "APA review can afford [him] adequate relief." APA relief cannot make Griff Lane whole for the government's violation of the Rehabilitation Act in this case. Only the damages remedy under Section 504 can do so. This Court should make that remedy available to him now.

Respectfully submitted,

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physical qualifications for commissioning in the armed forces reserve is an essential program requirement of the [Academy], they have not even attempted to make any reasonable accommodations for Lane's disability, and they failed to make an individualized inquiry into the particular facts of Lane's case. [Pet. App. 61a.]